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No. 97-597

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

MARIA NAVARRO, PETITIONER

v.

FUJI HEAVY INDUSTRIES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this diversity action based on Illinois law, the court of appeals erred in affirming summary judgment on the ground that the plaintiff failed to submit sufficient admissible evidence to make out a *prima facie* case of negligent design of an automobile's suspension system.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Fuji Heavy Industries, Inc. (Fuji) states that it has no parent company and its only non-wholly owned subsidiary is Subaru-Isuzu Automobile, Inc., which is 51% owned by Fuji and 49% owned by Isuzu Motors Limited.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Fuji Heavy Industries, Inc. (Fuji), respectfully submits that the petition for certiorari should be denied.

STATEMENT

This diversity action arises out of a rollover accident involving a Subaru automobile that was manufactured in Japan by respondent Fuji in August 1981. At the time of the accident almost eleven years later, in July 1992, the car had been driven approximately 125,000 miles along roads in the Chicago, Illinois area that "are heavily salted during the winter." Pet. App. 2a. The accident occurred when the automobile's "rear suspension gave way suddenly and unexpectedly as a result of having rusted through." *Id.* at 1a. Petitioner Navarro, who suffered injuries when she was thrown from the vehicle during the rollover, sued Fuji for negligence in the design of the rear suspension, alleging that the suspension was not completely sealed from the elements and thus was susceptible to rusting through from the inside out without providing any visual clue of that process — at least if the car were driven long enough on heavily salted roads. The district court granted summary judgment in Fuji's favor, and a unanimous panel of the Seventh Circuit affirmed.

1. Navarro initially brought this action in Illinois state court. In her amended complaint, she alleged five claims on behalf of herself and her two minor children (who were also passengers in the car). Against Fuji she asserted claims for strict products liability and for negligence. She also asserted similar claims against Subaru of America, Inc., the U.S. distributor of the automobile. And she asserted a claim for negligence against Robert Johnston, the owner and driver of the vehicle.

The state court dismissed Navarro's strict liability claim against Subaru of America as barred by Illinois's ten-year statute of repose. It also granted summary judgment in Subaru of America's favor on Navarro's claim for negligence. Navarro settled with Johnston. After Navarro

disclosed in response to interrogatories that she had incurred medical expenses in excess of $85,000 as a result of the accident, Fuji, the sole remaining defendant, removed the case to federal court.

The district court dismissed the minors' claims pursuant to stipulation. It also dismissed Navarro's strict liability claim against Fuji as time-barred. That left only a single claim in the case: Navarro's claim that Fuji negligently designed the Subaru's "suspension components, especially the inner arms," so that they were "susceptible to premature corrosion" and "not adequately rustproofed." R. 1, Ex. 1, count IV, ¶¶ 5-8; Pet. App. 2a, 14a.

2. Fuji moved for summary judgment on Navarro's negligent design count. Fuji argued that Navarro had failed to "establish two essential elements of a *prima facie* negligent design case" under Illinois law: the fact that "her 1992 injuries resulted from a defective and unreasonably dangerous condition of the car which existed when it left Fuji's control in 1981"; and a deviation by Fuji "from the applicable standard of care when it designed and manufactured the car." Pet. App. 14a.

Rather than presenting any evidence of its own in support of its summary judgment motion, Fuji "put the plaintiff to her proof" as permitted under Rule 56 of the Federal Rules of Civil Procedure. Pet. App. 5a (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986)); see generally *Celotex*, 477 U.S. at 322-24 (stating that Rule 56 "mandates the entry of summary judgment * * * against a party who fails to makes a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"; and rejecting the argument that a movant for summary judgment is required to submit affidavits in support of the motion). In an effort to satisfy her obligations under *Celotex*, Navarro submitted four items of "evidence": (1) an "unverified report by Maurice Howes * * *, a 'metallurgical consul-

tant'"; (2) "a 1991 report by the American Iron and Steel Institute" (AISI) relating to corrosion; (3) a recall notice relating to the problem of undetectable rust in the suspension system that was issued by the company in 1990 (nine years after the vehicle involved in the accident was manufactured); and (4) a three-page affidavit of Crispin Hales, an engineering expert. Pet. App. 16a, 4a-5a, 8a.

The district court granted Fuji's motion for summary judgment. Pet. App. 11a-25a. As an initial matter, the court noted that in deciding whether Navarro had established a *prima facie* case, it could "consider only evidence which would be admissible at trial." *Id.* at 16a. The Howes report, the district court ruled, was unverified and unauthenticated and therefore inadmissible. *Id.* at 17a. Even if admissible, the district court added, the Howes report would "not have any bearing on whether Fuji knew or should have known about the defect, whether the defect caused Navarro's injury, or whether Fuji failed to use a reasonable standard of care." *Id.* at 18a.

The district court concluded that the 1990 recall notice and the AISI report were admissible but of very limited value in establishing a *prima facie* case. The 1990 recall notice, the court explained, "could only be used for the limited purpose of establishing that the car's suspension system was defective," but would "not be admissible to show that Fuji knew or should have known about the defect, or * * * failed to use a reasonable standard of care at the time relevant to this lawsuit, the 1981 date of manufacture." Pet. App. 16a. Similarly, the AISI report, although admissible, "contains little which could aid the trier of fact in proving any contested issue in the instant case" and "does not aid Navarro in her search for a *prima facie* case." *Id.* at 23a.

Turning to the three-page affidavit of Crispin Hales, the district court concluded that it was "inadmissible under Federal Rule of Evidence 702." Pet. App. 18a. Initially, the district court noted that the admissibility of expert

testimony is governed by this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See Pet. App. 19a. Under *Daubert*, the court explained, experts "cannot float their conclusions on cushions of air; they must rest those conclusions upon foundations built from reliable scientific explanation." Pet. App. 19a. Hales's affidavit, however, failed to satisfy that requirement. For example, "Hales professes that Fuji knew of the defect in the suspension arm because it issued the 1990 recall notice but does not even attempt to show a basis for any such knowledge"; "states that the corrosion caused the failure of the suspension arm and the loss of control of the car" but "does not explain how [Hales] knows this"; and asserts that Fuji failed to apply the knowledge and skill ordinarily used by reasonably well qualified engineers but "makes no attempt to explain what that knowledge or skill would have been." *Id.* at 20a-21a. In addition,

> Hales states that Fuji was aware that users of the car could not detect the corrosion. Hales does not mention whether corrosion or problems with the suspension arm would be detectable during dealer-performed or other professionally-performed routine or scheduled maintenance. * * * Hales intuits that Fuji was aware of the levels of road salt and corrosion to which cars operating in the "Rust Belt" were exposed.

Id. at 20a-21a. Based on its extensive review of Hales's affidavit (see *id.* at 20a-22a), the district court thus concluded that it "sets forth no reliable foundation for its conclusions" and "do[es] not satisfy even a liberal reading of the *Daubert* requirements." *Id.* at 20a, 22a.

Having excluded Hales's affidavit as inadmissible, the district court stated that "[e]ven construing evidence and drawing inferences in favor of Navarro," petitioner had "failed to establish a *prima facie* case of negligent design." Pet. App. 25a. The district court accepted Fuji's alternative argument that, at most, the Subaru "simply wore out" and

that Fuji could not be held liable on that basis. *Id.* at 24a. The court explained:

> Both of Navarro's experts stated essentially that the car's suspension arm simply deteriorated over time. Even if the court were to accept those experts, neither expert's testimony would show that such wear occurred as a result of Fuji's negligence in 1981.

Ibid. Thus, the court entered summary judgment in favor or Fuji. *Id.* at 25a. Navarro's motion to alter or amend the judgment was subsequently denied. *Id.* at 26a.

3. A panel of the Seventh Circuit unanimously affirmed. Pet. App. 1a-10a. At the outset, the court of appeals explained that a negligent design claim under Illinois law is governed by an "objective" test that focuses on what "Fuji should have done about rust in light of what it should have known" in 1981. *Id.* at 3a. To demonstrate that the Subaru's rear suspension's design was defective, the court of appeals continued, Navarro was required to "show * * * that due care required Fuji to design the rear suspension in such a way that it either would not rust even if driven for many years in Chicago or, more plausibly, that if it did rust the rust would show so that the suspension could be replaced before it gave way." *Id.* at 4a.

The court then examined the four items proffered by Navarro in opposition to Fuji's summary judgment motion and considered whether they sufficed to establish a *prima facie* case of negligent design under Illinois law. The Howes report, the court first explained, was unverified and thus "properly ruled inadmissible" by the trial court. Pet. App. 5a; see also *ibid.* (stating as well that H. .es report "in any event added nothing material to the [Hale] affidavit"). As for the 1990 recall notice and AISI report, the court of appeals, like the district court, treated them as admissible but of very limited value. The recall notice, the court stated, "adds nothing to the [Hale] affidavit" because it "merely

shows that in 1990 (for there is no indication that Fuji discovered the problem earlier and sat on it) Fuji discovered the problem of undetectable rusting." *Id.* at 8a. And while the AISI report contained "some evidence that in the early 1980s Japanese cars were not as resistant to rust as American cars were," it contained no "evidence that the difference created an incremental hazard great enough to make the Japanese cars defective." *Ibid.*

Turning to the Hales affidavit, the court of appeals explained that the district court was "only half right in finding that [it] * * * flunked the *Daubert* test." Pet. App. 5a. Thus, Hales's examination of the accident vehicle, and his resulting explanation of "how the accident had come about" through "the insidious corrosion of the rear suspension," was fully admissible. *Id.* at 6a. Nevertheless, Hales's assertion that the rear suspension's design was negligent and unreasonable in 1981 was completely lacking in any support. *Id.* at 7a. The court of appeals explained:

> [A]t most the affidavit is evidence that Fuji should have known back in 1981 that its rear suspension might rust through in highly corrosive driving environments. There is no indication that responsible engineers at the time thought the hazard considerable because undetectable, and therefore worth guarding against and if so by what means, or that Fuji could have redesigned the suspension to avoid the hazard at a cost commensurate with the expected accident cost, which might reasonably have seemed slight — or indeed at any cost. The affidavit is silent about what auto manufacturers were doing about corrosion in 1981.

Ibid. Thus, the court of appeals rejected as not "grounded in * * * an expert study of the problem" and "nakedly conclusional" Hales's assertion that the Subaru's rear suspension had been negligently designed.

The court of appeals also rejected Navarro's contention that "the gaps in the expert's affidavit would have been filled if only [Fuji], before moving for summary judgment, had deposed the expert." Pet. App. 7a. "[T]here is no duty," the court explained, "to cross-examine or depose your opponent's witnesses so that they can supplement the testimony they failed to give on direct examination or in their affidavit." *Ibid.* And finally, the court upheld the district court's denial of Navarro's post-judgment motion. *Id.* at 8a-9a.[1]

REASONS FOR DENYING THE PETITION

As the foregoing account of the proceedings below makes clear, the outcome of this diversity action turned, in the end, on the quantum of evidence presented by petitioner Navarro in support of her claim that Fuji acted negligently in 1981 when it designed the rear suspension of the accident vehicle. The district court ruled that Navarro's proffer failed to make out a *prima facie* case of design defect under Illinois law, and granted summary judgment to Fuji. A panel of the Seventh Circuit unanimously affirmed, again relying on a highly fact-intensive (and necessarily case-specific) examination of the evidence presented by Navarro to the trial court.

In an effort to transform the court of appeals' fact-bound ruling into one worthy of this Court's review, and ultimately to persuade this Court to hold this case pending the outcome of *General Electric Co.* v. *Joiner*, No. 96-188, the petition for certiorari targets the Seventh Circuit's determination that a certain portion of the affidavit of petitioner's expert was so conclusory in nature that it was properly ruled inadmissible by the trial court under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In petitioner's view,

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[1] In dicta, the Seventh Circuit disagreed with Fuji's "alternative ground for upholding the district court's judgment, that the Subaru 'just wore out.'" Pet. App. 3a-4a.

this aspect of the court of appeals' decision gives rise to the following question presented:

> What is the standard of appellate review for trial court decisions excluding expert testimony under *Daubert* * * * in a summary judgment proceeding when the expert has never been deposed or voir dired by the trial court?

Pet. i. As we explain below, however, that question is not properly or squarely presented in this case; and, even if it were, the question could not possibly be answered in a way that would alter the result below. Accordingly, review should be denied.

1. The trial court in this case ruled that Hales's affidavit was inadmissible under *Daubert*. In affirming, the Seventh Circuit panel made no mention of the "abuse of discretion," "manifestly erroneous," or "heightened abuse of discretion" standards of review that petitioner maintains have been adopted by the various circuits. Pet. 4-5. Instead, the Seventh Circuit plainly applied *de novo* review to the district court's decision. The court of appeals made no effort to separate out the admissibility ruling (which petitioners say is reviewable only for manifest error in the Seventh Circuit) from the summary judgment ruling (reviewable *de novo*); instead, it applied *de novo* review to all issues in the appeal. Thus, the Seventh Circuit declared — without acknowledging any discretion in the trial court — that the district court "was only half right in finding that the expert's affidavit flunked the *Daubert* test." Pet. App. 5a. There is not the slightest trace of deference to the trial court's rulings in Chief Judge Posner's opinion for the panel.

Because the court of appeals applied *de novo* review to the trial court's rulings, petitioner could not possibly benefit from any resolution of the question presented. There is no more exacting standard of review than *de novo*. She has already benefited from *de novo* review of a decision that, it

must be remembered, was in Fuji's favor. It follows that the resolution of the question she presents (or for that matter any decision by this Court in *Joiner*) could not possibly change the outcome of this case. For that reason, review should be denied.

2. Review should also be denied because petitioner has waived any argument that she is entitled to a heightened standard of review under *Daubert*. In her court of appeals' brief, petitioner acknowledged that the district court's exclusion of Hales's affidavit was *reviewable under an abuse of discretion standard*. See Pet. C.A. Br. 1 (identifying pertinent issue on appeal as "[w]hether the District Court abused its discretion in finding that the affidavit of plaintiff's expert, Crispin Hales, Ph.D., was inadmissible"); *id.* at 8 (stating that the "trial court has broad discretion in ruling on the admissibility of evidence, including expert testimony," and noting that "the Court of Appeals will reverse in the event of an abuse of that discretion"); *id.* at 8-9 (arguing that exclusion of Hales's testimony was an "abuse of discretion"). Compare Pet. 4 (stating, inconsistently, that Seventh Circuit applies "manifestly erroneous" standard of review). Having conceded that an abuse of discretion standard governs the issue, petitioner has waived any right to claim a more exacting form of appellate review in this Court or the court below.

3. This case, moreover, does not cleanly present the admissibility question because the lower courts' discussion of admissibility was intertwined with their evaluation of whether the testimony contained in the Hales affidavit would (if admitted) establish a *prima facie* case. The district court, for example, not only ruled that Hales's affidavit was inadmissible but also stated:

> Both of Navarro's experts stated essentially that the car's suspension arm simply deteriorated over time. *Even if the Court were to accept those experts, neither expert's*

> *testimony would show that such wear occurred as a result of Fuji's negligence in 1981.*

Pet. App. 24a (emphasis added). In view of the district court's alternative holding that Hales's testimony, *even if admitted*, would not have sufficed to defeat summary judgment, the outcome in the trial court would be no different if Hales's testimony were ruled admissible.

Similarly, the court of appeals, in discussing the admissibility of Hales's affidavit, took pains to point out the lack of probative value of the inadmissible statements made in that affidavit. See Pet. App. 5a-8a. Thus, the Seventh Circuit opined that Hales's statement that Fuji was aware of the special corrosion problems in Chicago was "correct[] but inconsequent[ial]." *Id.* at 6a. In like manner, the court noted that Hales's assertion that Fuji knew that road salt could have a corrosive effect on the rear suspension "amounts to nothing more than the truism that a manufacturer of a steel product is charged with elementary knowledge that salt is corrosive." *Id.* at 7a. Because the Seventh Circuit strongly suggested that much of the inadmissible testimony of Hales was in any event of little or no probative value, it remains unclear whether the admissibility discussion was necessary to the court of appeals' holding. Under these circumstances, this Court should follow its usual practice of declining to review issues that were not squarely passed upon by the court below.

4. Review should also be denied because the Seventh Circuit's decision, insofar is it actually rested on the conclusion that a portion of Hales's affidavit was inadmissible, was plainly correct. As previously explained, the court of appeals concluded that certain portions of the Hales affidavit were admissible, thereby disagreeing with the district court's wholesale exclusion of the affidavit. As to other portions of the affidavit, the appellate court indicated that they were inadmissible but went on to explain why they nevertheless would not (if admitted) suffice to establish a *prima facie*

case. Indeed, the only statement in the Hales affidavit that the court of appeals said was "inadmissible, because nakedly conclusional," but which the court did not go on to say also fell short of a *prima facie* case, was Hales's assertion that the rear suspension's design in 1981 was "negligent and unreasonable." Pet. App. 7a, 8a.

That portion of Hales's affidavit, however, was obviously inadmissible because it consisted of nothing more than a bare assertion with respect to the ultimate issue in the case — whether the 1981 design was, in fact, the result of negligence. As the court of appeals correctly noted, the affidavit "contains no support" whatsoever for that "nakedly conclusional" statement, and "a conclusion without any support is not * * * entitled to the dignity of evidence." Pet. App. 7a, 8a. As the district court correctly explained, testimony of this kind cannot withstand "even a liberal reading of the *Daubert* requirements." *Id.* at 22a.

5. Petitioner makes a variety of other arguments that are either meritless or irrelevant to the sole question presented in the petition. See S. Ct. Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Thus, petitioner maintains that the result in this case would have been different if it had been brought in another jurisdiction. Pet. 5-9. In view of the fact-bound and case-specific nature of rulings on motions for summary judgment, that argument is difficult if not impossible to prove. In any event, the cases cited by petitioner do not lend any support to this contention.

Equally meritless is petitioner's repeated suggestion (see Pet. 4, 5-8, 10) that *Daubert* screening is unavailable, or rarely available, at the summary judgment stage or in the absence of a preliminary hearing under Rule 104(a) of the Federal Rules of Evidence. That argument is soundly refuted by *Daubert* itself, which teaches that trial courts "remain[] free to * * * grant summary judgment" when expert testimony is insufficient to raise a genuine issue of material fact.

509 U.S. at 596. And finally, petitioner is wrong to suggest (Pet. 9-10) that the Seventh Circuit's approach to *Daubert* issues is unduly strict or conflicts with *Daubert* itself. In any event, the only question presented in the petition has to do with the standard of appellate review, not how *Daubert* is applied by the trial court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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